



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 13-236; FCC 17-40]

National Television Multiple Ownership Rule

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: An Order on Reconsideration reinstates the UHF discount, which allows commercial broadcast television station owners to discount the audience reach of their UHF stations when calculating compliance with the national television ownership rule. With the reinstatement of the discount, the Commission will commence a proceeding later this year to consider whether the national television audience reach cap, including the UHF discount, remains in the public interest. The Order on Reconsideration finds that the UHF discount is inextricably linked to the national cap, and when the Commission voted previously to eliminate the discount, it failed to consider whether this de facto tightening of the national cap was in the public interest and justified by current marketplace conditions. The Order on Reconsideration grants in part the Petition for Reconsideration (Petition) filed by ION Media Networks and Trinity Christian Center of Santa Ana, Inc. (Petitioners), and dismisses as moot requests to reconsider the grandfathering provisions applicable to broadcast station combinations affected by elimination of the discount and the decision to forego a VHF discount.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Brendan Holland, Industry Analysis Division, Media Bureau, Brendan.Holland@fcc.gov (202) 418-2757.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Reconsideration in MB Docket No. 13-236, FCC 17-40, adopted April 20, 2017, and released April 21, 2017. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, 445 12th Street, SW., Room CY-A257, Washington, DC 20554, or online at <https://www.fcc.gov/ecfs/filing/0426267477284>. To request this document in accessible formats for people with disabilities (e.g. braille, large print, electronic files, audio format, etc.) or to request reasonable accommodations (e.g. accessible format documents, sign language interpreters, CART, etc.), send an email to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis

1. Background. In 1985, when the Commission revised the national television multiple ownership rule to prohibit a single entity from owning television stations that collectively exceeded 25 percent of the total nationwide audience, it also adopted a 50 percent UHF discount to reflect the coverage limitations faced by analog UHF stations. The discount was intended to mitigate the competitive disadvantage that UHF stations suffered in comparison to VHF stations, as UHF stations were technically inferior, producing weaker over-the-air signals, reaching smaller audiences, and costing more to build and operate. This technical inferiority, inherent in analog television broadcasting, was significant in 1985 because the vast majority of viewers received programming from broadcast television stations via over-the-air signals.

2. Eleven years later, in the Telecommunications Act of 1996, Congress directed the Commission to increase the national audience reach cap from 25 percent to 35 percent. Subsequently, the Commission reaffirmed the 35 percent national cap in its 1998 Biennial Review Order. The United States Court of Appeals for the District of Columbia later remanded the 1998 Biennial Review Order after finding that the decision to retain the national cap was arbitrary and capricious. In addition, the court found that the Commission failed to demonstrate that the national cap advanced competition, diversity, or localism. In the 2002 Biennial Review Order, the Commission determined the cap should be raised to 45 percent. In both of these Orders, the Commission also considered and retained the UHF discount.

3. Following adoption of the 2002 Biennial Review Order and while an appeal of that order was pending, Congress revised the cap by including a provision in the 2004 Consolidated Appropriations Act (CAA) directing the Commission to modify its rules to set the cap at 39 percent of national television households. The CAA further amended Section 202(h) of the 1996 Act to require a quadrennial review of the Commission's broadcast ownership rules, rather than the previously mandated biennial review. In doing so, Congress excluded consideration of any rules relating to the 39 percent national audience reach limitation from the quadrennial review requirement.

4. Prior to the enactment of the CAA, several parties had appealed the Commission's 2002 Biennial Review Order to the U.S. Court of Appeals for the Third Circuit (Third Circuit). In June 2004, the Third Circuit found that the challenges to the Commission's actions with respect to the national audience reach cap and the UHF discount were moot as a result of Congress's action. Specifically, the court held that the CAA rendered moot the challenges to the Commission's decision to retain the UHF discount. The court found that the

CAA insulated the national cap, including the UHF discount, from the Commission's quadrennial review of its media ownership rules. In February 2008, the Commission similarly concluded in the 2006 Quadrennial Review Order that, the UHF discount is insulated from review under Section 202(h) as a result of the CAA, and thus beyond the scope of the quadrennial review.

5. On June 13, 2009, the Commission completed the transition from analog to digital television broadcasting for full-power stations. While UHF channels were inferior for purposes of broadcasting in analog, the DTV transition affirmed the Commission's longstanding belief that digital broadcasting would eliminate the technical disparity between UHF and VHF signals. In fact, experience has confirmed that UHF channels are equal, if not superior, to VHF channels for the transmission of digital television signals. Therefore, in 2013, the Commission adopted a Notice of Proposed Rulemaking (Notice) to consider eliminating the UHF discount. Then-Commissioner Pai dissented from the Notice, contending that any such rulemaking should also evaluate whether the national cap itself should be modified. The Notice, however, did not seek comment on the national cap broadly.

6. In a Report and Order adopted in August 2016, the Commission eliminated the UHF discount, finding that UHF stations are no longer technically inferior to VHF stations following the DTV transition and that the competitive disparity between UHF and VHF stations had disappeared. Then-Commissioner Pai and Commissioner O'Rielly dissented from the decision, with then-Commissioner Pai noting, It is undeniable that eliminating the UHF discount has the effect of expanding the scope of the national cap rule. Companies . . . that are currently in compliance with the national cap ownership rule will be above the cap once the UHF discount is terminated. Yet, the Commission has refused to review whether the current national cap

ownership rule is sound or whether there is a need to make it more stringent, which is precisely what [the Report and Order] does. On November 23, 2016, ION and Trinity filed their Petition seeking reconsideration of the decision. Free Press, the National Hispanic Media Coalition, Common Cause, Media Alliance and the United Church of Christ Office of Communication, Inc. (Public Interest Opponents) and the American Cable Association (ACA) filed Oppositions to the Petition; the National Association of Broadcasters (NAB), Sinclair Broadcast Group, Inc. (Sinclair), Nexstar Broadcasting, Inc. (Nexstar), Univision Communications Inc. (Univision), and various TV licensees filed comments or replies supporting the Petition.

7. The UHF Discount and National Cap Should Have Been Considered in Tandem.

The Order on Reconsideration finds that the Petitioners and their supporters provide valid reasons to reconsider the decision to eliminate the UHF discount. The UHF discount and the national audience reach cap are closely linked, and the Commission failed to provide a reasoned basis to eliminate the discount in isolation without also fully considering whether the cap should be modified. Accordingly, the Order on Reconsideration reinstates the UHF discount, and the Commission will open a proceeding later this year to consider whether the national audience reach cap, including the UHF discount, should be modified.

8. Petitioners and their supporters assert that the Commission should not have eliminated the UHF discount without adducing further evidence that the action would be in the public interest. The Petitioners argue that in eliminating the discount the Commission actually harmed the public interest by increasing the competitive disparity between broadcasters and other video programming distributors. CBS and Sinclair also point to a lack of evidence that the public interest would be harmed by retaining the UHF discount. NAB argues that, by

eliminating the UHF discount in isolation, the Commission was not able to determine whether the change promotes the public interest purposes of the cap itself.

9. The history of the UHF discount and national audience reach cap demonstrates that, with the exception of the Report and Order, the Commission has always considered the UHF discount together with the national cap. Referring to this history, Nexstar argues that, because the cap establishes a limit and the discount defines how to calculate whether the limit is reached, the cap and discount are inextricably intertwined. Petitioners assert that the national cap and discount go hand-in-hand; the FCC has no authority to change one without at least reviewing the impact that the change will have on the other. Sinclair agrees, and urges the Commission, in any review of the cap, to eliminate it entirely.

10. While the Commission determined in the Report and Order that it should eliminate the discount without simultaneously reassessing the cap, on reconsideration, the Commission agrees with the arguments presented by Petitioners and their supporters that the Commission's prior decision was in error. The Commission finds that any adjustment to the UHF discount affects compliance with the national cap, and the elimination of the discount has the effect of substantially tightening the cap in some cases. In the Report and Order, however, the Commission never explained why tightening the cap was in the public interest or justified by current marketplace conditions. It presented no examples of how the current cap, including the UHF discount, was harming competition, diversity, or localism. Eliminating the UHF discount on a piecemeal basis, without considering the national cap as a whole, was arbitrary and capricious, and unwise from a public policy perspective.

11. Contrary to ACA's claims that consideration of the discount without consideration of the cap was appropriate, the Commission erred by eliminating the discount and

thus substantially tightening the cap without considering whether the cap should be raised to mitigate the regulatory impact of eliminating the UHF discount. While it is true that the UHF discount no longer has a sound technical basis following the DTV transition, the Commission failed to provide a reasoned explanation for eliminating the discount without conducting a broader review of the cap, which it deferred indefinitely. Reliance on the self-imposed narrow scope of the Notice was not a sound basis for the Commission to conclude that it could not consider the broader public interest issues posed by retaining the national cap while eliminating the UHF discount. Nothing prevented the Commission from issuing a broader Notice at the outset or broadening the scope of the proceeding by issuing a further notice to consider whether the public interest would be served by retaining the cap while eliminating the UHF discount.

12. This error is problematic because the Commission has acknowledged, both in the record of this proceeding and in the most recent quadrennial media ownership review, the greatly increased options for consumers in the selection and viewing of video programming since Congress directed the Commission to modify the cap in 2004. The Report and Order, however, failed to adequately consider the impact of those changes on the appropriateness of eliminating the UHF discount while not adjusting the national cap. The Commission should have considered these changes and assessed the current need for a 39 percent national cap before eliminating the UHF discount and tightening the cap for some station groups, particularly in view of the industry's reliance on the UHF discount to develop long-term business strategies. Although the Commission considered the effect of the DTV transition, it failed to consider current marketplace conditions or whether tightening the cap was in the public interest. Thus, it is necessary to rectify the Commission's error by reinstating the discount so that it can be considered as part of a broader reassessment of the national audience reach rule, which will begin later this year.

13. Grounds for Reconsideration. The record in response to the Petition demonstrates disagreement on the factors that can support granting a petition for reconsideration. The Opponents claim that the Petition must be denied because it fails to present new facts or arguments not already considered and answered by the Commission in the underlying Report and Order. On the other hand, Nexstar claims that Section 1.429 of our rules, which governs petitions for reconsideration, should not be interpreted to preclude a petitioner for reconsideration from raising any argument that was mentioned in the underlying Commission order or a dissenting statement. Neither the Communications Act nor Commission rules preclude the Commission from granting petitions for reconsideration that fail to rely on new arguments. Commission precedent establishes that reconsideration is generally appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond.

14. The Petition, while reiterating some arguments made in response to the Notice, nonetheless provides valid grounds for the Commission to reconsider its previous action. The Commission failed to fully consider important arguments and lacked a reasoned basis for concluding that it could eliminate the discount without a broader review of the national cap. These are sufficient grounds under Section 1.429 for the Commission to reconsider its previous action even absent new facts or arguments.

15. Procedural Matters. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (SFRFA) relating to this Order on Reconsideration.

16. This Order on Reconsideration does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA). In addition, therefore, it

does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.

17. Supplementary Regulatory Flexibility Analysis. In compliance with the Regulatory Flexibility Act (RFA), this Supplemental Final Regulatory Flexibility Analysis (SFRFA) supplements the Final Regulatory Flexibility Analysis (FRFA) included in the Report and Order to the extent that changes adopted on reconsideration require changes in the conclusions reached in the FRFA. As required by the RFA, the FRFA was preceded by an Initial Regulatory Flexibility Analysis (IRFA) incorporated in the Notice which sought public comment on the proposals in the Notice.

18. This Order on Reconsideration reinstates the UHF discount in the Commission's national television multiple ownership rule. That rule currently prohibits a single entity from owning television stations that, in the aggregate, reach more than 39 percent of the total television households in the nation. When the cap was established and stations broadcast using analog technology, UHF broadcasting was considered technically inferior to VHF broadcasting. Therefore, the UHF discount allowed television stations broadcasting in the UHF spectrum to attribute those stations with only 50 percent of the television households in their Designated Market Areas. The Report and Order eliminated the UHF discount, finding that UHF stations are no longer technically inferior or competitively disadvantaged relative to VHF stations following the DTV transition.

19. The Order on Reconsideration finds that, because the UHF discount affects calculation of compliance with the national audience reach cap, the discount and cap are linked and the public interest is better served by considering the discount and cap in tandem. Rather than potentially tightening the national cap in some cases by eliminating the UHF discount, the

reinstatement of the discount returns broadcasters to the status quo prior to August 2016 for purposes of calculating their compliance with the cap. The Commission will begin a rulemaking proceeding later this year to consider whether it is in the public interest to modify the national cap, including the UHF discount.

20. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted in this Order on Reconsideration. The RFA generally defines the term small entity as having the same meaning as the terms small business, small organization, and small governmental jurisdiction. In addition, the term small business has the same meaning as the term small business concern under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. The FRFA accompanying the Report and Order described and estimated the number of small entities that would be affected by elimination of the UHF discount. Reinstatement of the UHF discount in this Order on Reconsideration applies to the same entities affected by elimination of the discount.

21. Television Broadcasting. This Economic Census category comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.

The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of \$25,000,000 or less, 25 had annual receipts between \$25,000,000 and \$49,999,999 and 70 had annual receipts of \$50,000,000 or more. Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size.

22. The Commission has estimated the number of licensed commercial television stations to be 1,384. Of this total, 1,275 stations (or about 92 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on February 24, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 394. Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

23. The Commission notes, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. The estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules

may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive.

24. The FRFA accompanying the Report and Order stated that elimination of the UHF discount modified calculation of compliance with the national audience reach cap and would affect reporting, recordkeeping, or other compliance requirements. Specifically, the Commission would have potentially needed to modify FCC forms or related instructions pursuant to the Report and Order. This Order on Reconsideration reinstates the UHF discount, thereby maintaining the current methodology for calculating compliance with the cap. Therefore, no changes to FCC forms or instructions will be necessary and the reporting, recordkeeping, and other compliance requirements will not be affected. Thus, reinstatement of the UHF discount will not impose additional obligations or expenditure of resources on small businesses.

25. The Order on Reconsideration determined that the discount and cap were linked and that considering them in tandem would better serve the public interest than simply eliminating the discount alone. Examining the discount and cap together in a rulemaking proceeding to be opened later this year will positively impact broadcasters, including small entities, and avoid the potential harms described by Petitioners and their supporters at paragraphs 8 and 10, above.

26. Ordering Clauses. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Section 405(a) of the Communications Act of 1934, as amended, and Section 1.429 of the Commission's rules, the Petition for Reconsideration filed by ION Media Networks, Inc. and Trinity Christian Center of Santa Ana, Inc. on November 23, 2016, IS GRANTED IN PART and otherwise IS DISMISSED AS MOOT, to the extent provided herein.

27. IT IS FURTHER ORDERED that pursuant to the authority contained in Sections 1, 2(a), 4(i), 4(j), 303(r), 307, 309, and 310 of the Communications Act of 1934, as amended, this Order on Reconsideration IS ADOPTED. The rule modification discussed in this Order on Reconsideration shall be effective [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION ON THE FEDERAL REGISTER**].

28. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Order on Reconsideration to Congress and to the Government Accountability Office pursuant to the Congressional Review Act.

29. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order on Reconsideration, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR part 73

Television; Radio.

FEDERAL COMMUNICATIONS COMMISSION.

Marlene H. Dortch,
Secretary

Final Rule

For the reasons discussed in the preamble, the Federal Communication Commission amends 47 CFR part 73 as follows:

PART 73 – RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336 and 339.

2. Amend § 73.3555 by revising paragraph (e)(1) and (e)(2)(i) to read as follows:

§ 73.3555 Multiple ownership.

* * * * *

(e) *National television multiple ownership rule.* (1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

(2) * * *

(i) *National audience reach means* the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

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[FR Doc. 2017-09001 Filed: 5/4/2017 8:45 am; Publication Date: 5/5/2017]